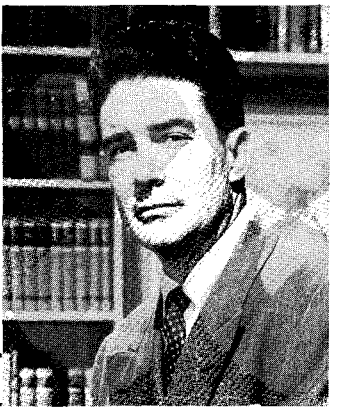
THE
Dan Smoot Report

Vol. 8, No. 29 (Broadcast 362) July 16, 1962 Dallas, Texas



DAN SMOOT

SUPREME COURT'S PRAYER DECISION—PART I

For many years, the question of religious services in the public schools of New York State has been the source of much controversy and confusion. Administrators of some districts would permit no religious service at all. Their schools were criticized for being Godless and materialistic. In many districts, individual principals or teachers were permitted to use their own judgment. Those who encouraged any kind of religious ceremony were often condemned for bringing "sectarianism" into the public schools.

In 1951, the New York State Board of Regents (highest executive and administrative body for the public school system of the State) tried to eliminate the confusion and controversy. The Board composed, for recital aloud by teachers and children in each classroom at the start of every school day, the following 22-word prayer:

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country."

No school system was ordered to use this Regents Prayer. The Board of Regents merely recommended it as a prayer which all school systems *could* use, safely, without danger of creating controversy, because, Board members felt, it could not possibly be offensive to anyone; yet, it would satisfy those parents and children who felt a need for some sort of public recognition of God.

The Board of Regents did, however, issue instructions intended to "protect" those children who might not want to say the prayer. Teachers were permitted to lead their classes in recitation of the prayer, but the children did not have to recite if they did not wish to. If a child did not wish to hear the prayer, he could leave the room while it was being recited; and the teachers were forbidden to make any record or comment about any child

THE DAN SMOOT REPORT, a magazine published every week by The Dan Smoot Report, Inc., mailing address P. O. Box 9538, Lakewood Station, Dallas 14, Texas, Telephone TAylor 1-2303 (Office Address 6441 Gaston Avenue). Subscription rates: $10.00 a year, $6.00 for 6 months, $3.00 for 3 months, $18.00 for two years. For first class mail $12.00 a year; by airmail (including APO and FPO) $14.00 a year. Reprints of specific issues: 1 copy for 25¢; 6 for $1.00; 50 for $5.50; 100 for $10.00 — each price for bulk mailing to one person. Add 2% sales tax on all orders originating in Texas for Texas delivery.

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who did choose to leave the room or to remain silent while the prayer was being recited.

Actually, not many school districts in the State of New York chose to use the Regents Prayer. The biggest district in the state, for example — New York City — does not use the prayer.

In 1958, the Board of Education of Union Free School District No. 9, New Hyde Park, Long Island, New York, adopted the Regents Prayer and directed the district's principal to cause the prayer to be said aloud in the presence of a teacher at the beginning of each school day.

On January 22, 1959, five parents in the district (two of whom are Jewish; one, a member of the Ethical Culture Society; one, a Unitarian; and one, an atheist) brought suit against the School Board of Union Free School District No. 9 to outlaw use of the Regents Prayer.

Losing their case in lower courts, the complaining parents appealed to the highest New York court — the Court of Appeals — which rejected their protest against the Regents Prayer in a 5 to 2 decision. The complaining parents appealed to the United States Supreme Court.

Twenty states came into the case, as friends of the Court, to support the position of the school board. On the opposite side, the American Civil Liberties Union, the American Jewish Committee, the Anti-Defamation League, and other Jewish and non-Jewish organizations supported the five parents who objected to the prayer. William J. Butler, a New York City attorney, represented the five parents. Bertram B. Daiker, a lawyer of Port Washington, New York, represented the school board. Porter B. Chandler, of New York City, represented parents in the New Hyde Park school district who wanted to keep the Regents Prayer.

On Monday, June 25, 1962, the Supreme Court, in a 6 to 1 decision, held that the Regents Prayer violated the "establishment clause" of the First Amendment to the Constitution of the United States, "as reinforced by provisions of the Fourteenth Amendment."

The First Amendment says:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

The Supreme Court decision specifically says that the Regents Prayer did not violate that portion of the First Amendment which restrains Congress from "prohibiting the free exercise" of religion, but violated only the "establishment clause"—that portion which restrains Congress from making a law "respecting an establishment of religion."

Justice Hugo Black wrote the majority opinion. He was joined by Chief Justice Earl Warren, and by Justices Tom C. Clark, John Marshall Harlan, and William J. Brennan, Jr. Justice William O. Douglas, concurred in the decision, in a separate opinion.

Justice Felix Frankfurter did not participate, because he was in a hospital. Justice Byron R. White (newest judge on the Court) did not participate, because he joined the Court after the case had been argued.

Justice Potter Stewart dissented.

The Majority Opinion

The Supreme Court's majority decision, as written by Justice Black, says:

We think that by using its public school system to encourage recitation of the Regents Prayer, the State of New York has adopted a practice wholly inconsistent with the establishment clause.

There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents Prayer is a religious activity. It is

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a solemn avowal of divine faith and supplication for the blessings of the Almighty....

The petitioners [the five complaining parents] contend, among other things that the state laws requiring or permitting use of the Regents Prayer must be struck down as violation of the establishment clause, because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs.

For this reason, petitioners argue, the state's use of the Regents Prayer in its public school system breaches the constitutional wall of separation between church and state.

We agree with that contention since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government.

It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.

The Book of Common Prayer, which was created under governmental direction and which was approved by Acts of Parliament in 1548 and 1549, set out in minute detail the accepted form and content of prayer and other religious ceremonies to be used in the established, tax-supported Church of England. The controversies over the Book and what should be its content repeatedly threatened to disrupt the peace of that country as the accepted forms of prayer in the established church changed with the views of the particular ruler that happened to be in control at the time.

Powerful groups representing some of the varying religious views of the people struggled among themselves to impress their particular views upon the government and obtain amendments of the Book more suitable to their respective notions of how religious services should be conducted in order that the official religious establishment would advance their particular religious beliefs.

Other groups, lacking the necessary political power to influence the government on the matter, decided to leave England and its established church and seek freedom in America from England's governmentally ordained and supported religion.

It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies.

Indeed, as late as the time of the Revolutionary War, there were established churches in at least eight of the thirteen former colonies and established religions in four of the other five.

But the successful revolution against English political domination was shortly followed by intense opposition to the practice of establishing religion by law. This opposition crystallized rapidly into an effective political force in Virginia where the minority religious groups (such as Presbyterians, Lutherans, Quakers, and Baptists) had gained such strength that the adherents to the established Episcopal church were actually a minority themselves.

In 1785-1786, those opposed to the established church (led by James Madison and Thomas Jefferson, who, though themselves not members of any of those dissenting religious groups, opposed all religious establishments by law on grounds of principle) obtained the enactment of the famous 'Virginia bill for religious liberty,' by which all religious groups were placed on an equal footing so far as the state was concerned....

By the time of the adoption of the Constitution [1789], our history shows that there was a widespread awareness among many Americans of the dangers of a union of church and state....

The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say.... Under that amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth

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Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally-sponsored religious activity.

There can be no doubt that New York's state prayer officially establishes the religious beliefs embodied in the Regents Prayer. . . . Neither the fact that the prayer may be denominationally neutral, nor the fact that its observance on the part of the students is voluntary, can serve to free it from the limitations of the establishment clause, as it might from the free exercise clause, of the First Amendment, both of which are operative against the states by virtue of the Fourteenth Amendment. . . .

The New York laws officially prescribing the Regents Prayer are inconsistent with . . . the purposes of the establishment clause. . . .

The Dissenting Opinion

Here is the full text of Justice Stewart Potter's dissenting opinion in the New York School Prayer case:

A local school board in New York has provided that those pupils who wish to do so may join in a brief prayer at the beginning of each school day, acknowledging their dependence upon God and asking His blessing upon them and upon their parents, their teachers, and their country. The court today decides that in permitting this brief nondenominational prayer the school board has violated the Constitution of the United States. I think this decision is wrong.

The court does not hold, nor could it, that New York has interfered with the free exercise of anybody's religion. For the state courts have made clear that those who object to reciting the prayer must be entirely free of any compulsion to do so, including any "embarrassment and pressures." cf. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624. But the court says that in permitting school children to say this simple prayer, the New York authorities have established "an official religion."

With all respect, I think the court has misapplied a great constitutional principle. I cannot see how an "official religion" is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our nation.

The court's historical review of the quarrels over the Book of Common Prayer in England throws no light for me on the issue before us in this case. England had then and has now an established church. Equally unenlightening, I think, is the history of the early establishment and later rejection of an official church in our own states. For we deal here not with the establishment of a state church, which would, of course, be constitutionally impermissible, but with whether school children who want to begin their day by joining in prayer must be prohibited from doing so. Moreover, I think that the court's task in this as in all areas of constitutional adjudication, is not responsibility aided by the uncritical invocation of metaphors like the "wall of separation," a phrase nowhere to be found in the Constitution. What is relevant to the issue here is not the history of an established church in sixteenth-century England or in eighteenth-century America, but the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our Government.

At the opening of each day's session of this court we stand, while one of our officials invokes the protection of God. Since the days of John Marshall our crier has said, "God save the United States and this honorable court." Both the Senate and the House of Representatives open their daily sessions with prayer. Each of our Presidents, from George Washington to John F. Kennedy, has upon assuming his office asked the protection and help of God.

The court today says that the State and Federal Governments are without constitutional power to prescribe any particular form of words to be recited by any group of the American people on any subject touching religion. The third stanza of "The Star-Spangled Banner," made our national anthem by Act of Congress in 1931, contains these verses:

"Blest with victory and peace, may the
Heav'n rescued land

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Praise the pow'r that hath made and preserved us a nation!

Then conquer we must, when our cause it is just, and this be our motto 'in God is our trust'."

In 1954 Congress added a phrase to the Pledge of Allegiance to the flag so that it now contains the words "one nation, under God, indivisible with liberty and justice for all." In 1952 Congress enacted legislation calling upon the President each year to proclaim a national day of prayer. Since 1865 the words "in God we trust" have been impressed on our coins.

Countless similar examples could be listed, but there is no need to belabor the obvious. It was all summed up by this court just ten years ago in a single sentence: "We are a religious people whose institutions presuppose a supreme being." *Zorach v. Clauson*, 343 U.S. 306, 313.

I do not believe that this court, or the Congress, or the President has by the actions and practices I have mentioned established an "official religion" in violation of the Constitution. And I do not believe the State of New York has done so in this case. What each has done has been to recognize and to follow the deeply entrenched and highly cherished spiritual traditions of our nation — traditions which come down to us from those who almost two hundred years ago avowed their "firm reliance on the protection of divine providence" when they proclaimed the freedom and independence of this brave new world.

I dissent.

Douglas's Concurring Opinion

Justice William O. Douglas concurred with the majority opinion in the New York School Prayer Case, but wrote a separate opinion to say that the Court majority reached what he regarded as the right decision, but for the wrong reasons. Justice Douglas admits that the Regents Prayer does not violate the "establishment clause," because it has nothing to do with an establishment of religion. He admits that the prayer does not violate the "free exercise" clause of the First Amendment, because it does not interfere with the free exercise of religion.

Justice Douglas thinks that all prayer or religious service of any kind should be forbidden in any public institution which is supported by tax money.

Justice Douglas makes it very clear that all the practices which Justice Stewart mentioned in his dissenting opinion (opening sessions of the Supreme Court and of Congress with prayer, and so on) should be outlawed — *and will be if and when they are ever* challenged in the courts. In his concurring opinion in the New York School Prayer case, Justice Douglas says:

The point for decision is whether the Government can constitutionally finance a religious exercise. Our system at the Federal and state levels is presently honeycombed with such financing. Nevertheless, I think it is an unconstitutional undertaking whatever form it takes. . . .

Plainly our Bill of Rights would not permit a state or the Federal Government to adopt an official prayer and penalize anyone who would not utter it. This, however, is not that case, for there is no element of compulsion or coercion in New York's regulation requiring that public schools be opened each day with the . . . [Regents] Prayer. . . . A child is free to stand or not stand, to recite or not recite, without fear of reprisal or even comment by the teacher or any other school officials.

In short, the only one who need utter the prayer is the teacher; and no teacher is complaining of it.

In the present case. . . . there is . . . no effort at indoctrination and no attempt at exposition. Prayers, of course, may be so long and of such a character as to amount to an attempt at . . . religious instruction. . . .

The question presented by this case is. . . . whether New York oversteps the bounds when it finances a religious exercise.

What New York does on the opening of its public schools is what we do when we open court. Our marshal has from the beginning

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announced the convening of the court and then added "God save the United States and this honorable court." That utterance is a supplication, a prayer in which we, the judges, are free to join, but which we need not recite any more than the students need recite the New York prayer.

What New York does on the opening of its public schools is what each House of Congress does at the opening of each day's business. . . .

In New York, the teacher who leads in prayer is on the public payroll; and the time she takes seems minuscule as compared with the salaries appropriated by State Legislatures and Congress for chaplains to conduct prayers in the legislative halls. Only a bare fraction of the teacher's time is given to reciting this short 22-word prayer, about the same amount of time that our marshal spends announcing the opening of our sessions and offering a prayer for this court.

Yet, for me the principle is the same, no matter how briefly the prayer is said, for in each of the instances given the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution.

It is said that the element of coercion is inherent in the giving of this prayer. If that is true here, it is also true of the prayer with which this court is convened, and with those that open the Congress. . . . Every such audience is in a sense a "captive" audience.

At the same time, I cannot say that to authorize this prayer is to establish a religion in the strictly historic meaning of those words. A religion is not established in the usual sense merely by letting those who choose to do so say the prayer that the public school teacher leads.

Yet, once government finances a religious exercise it inserts a divisive influence into our communities. The New York court said that the prayer given does not conform to all of the tenets of the Jewish, Unitarian, and Ethical Culture groups. One of the petitioners is an agnostic.

We are a religious people whose institutions presuppose a supreme being. Under our Bill of Rights, free play is given for making religion an active force in our lives. But if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government.

By reason of the First Amendment, Government is commanded to have no interest in theology or ritual, for on those matters, Government must be neutral. The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic — the no-believer — is entitled to go his own way. The philosophy is that if Government interferes in matters spiritual, it will be a divisive force. The First Amendment teaches that a Government neutral in the field of religion better serves all religious interests.

My problem today would be uncomplicated but for *Everson v. Board of Education* which allowed taxpayers' money to be used to pay the bus fares of parochial school pupils as a part of a general program under which the fares of pupils attending public and other schools are also paid. The Everson case seems in retrospect to be out of line with the First Amendment. . . .

God Is Now Subversive

The *Everson v. Board of Education* case, which Justice Douglas cites, originated in New Jersey. The Supreme Court heard the case in 1947. Douglas agreed with the majority in that decision — which he now thinks was wrong and should be reversed.

One need go no further to see what chaos the Supreme Court has caused in our whole system of law. According to our Supreme Court Justices, our Constitution has no fixed meaning at all: it means whatever a majority of the justices want it to mean on any particular day. And according to our President (and other liberal leaders) we must consider the last whim of the Supreme Court justices as "Supreme Law of the Land."

In its pretense of protecting religious freedom, the Supreme Court violates the First Amendment by denying children the right to worship in their schools. At the same time,

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it gives atheists the power to force their peculiar Godless practices on others by silencing Christians and other religious groups.

In his first Inaugural address, April 30, 1789, President George Washington spoke opinions which the present Supreme Court now officially regards as unconstitutional doctrine. The Father of our Country said:

It would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes, and may enable every instrument employed in its administration to execute with success the functions allotted to his charge. In tendering this homage to the Great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own, nor those of my fellow-citizens at large less than either. No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States. Every step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency; and in the important revolution just accomplished in the system of their united government the tranquil deliberations and voluntary consent of so many distinct communities from which the event has resulted can not be compared with the means by which most governments have been established without some return of pious gratitude, along with an humble anticipation of the future blessings which the past seems to presage. . . .

The propitious smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right which Heaven itself has ordained; . . .

Having thus imparted to you my sentiments as they have been awakened by the occasion which brings us together, I shall take my present leave; but not without resorting

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once more to the benign Parent of the Human Race in humble supplication that, since He has been pleased to favor the American people with opportunities for deliberating in perfect tranquility, and dispositions for deciding with unparalleled unanimity on a form of government for the security of their union and the advancement of their happiness, so His divine blessing may be equally *conspicuous* in the enlarged views, the temperate consultations, and the wise measures on which the success of this Government must depend.

Sequel

A review of the history of the First Amendment — and of authoritative commentary on it — clearly reveals the utter imbecility and/or ignorance of the Supreme Court justices who outlawed the Regents Prayer in the decision of June 25, 1962.

Such a review will be presented next week.

Apologists for the Supreme Court are saying that the Court merely outlawed the use of officially prepared prayers in public schools — that voluntary prayers by students and teachers are not affected.

The forces which fought for the Regents Prayer decision are planning to use this decision as a springboard to initiate a whole series of cases to outlaw not only every vestige of religious ceremony, or recognition of God, from schools, but also to outlaw even the *teaching about religion* in our public schools. This will also be reviewed subsequently.

It can be shown (by references to earlier Supreme Court decisions) that the Supreme Court corrupted and distorted the meaning of the Constitution in claiming that the Fourteenth Amendment extends the prohibitions of the First Amendment against *state governments.*

There are remedies (supported by Supreme Court precedents and sound constitutional doctrine) against a lawless court which is destroying our Constitution, and perverting the sacred principles on which our entire constitutional system rests.

WHO IS DAN SMOOT?

Dan Smoot was born in Missouri. Reared in Texas, he attended SMU in Dallas, taking BA and MA degrees from that university in 1938 and 1940.

In 1941, he joined the faculty at Harvard as a Teaching Fellow in English, doing graduate work for the degree of Doctor of Philosophy in the field of American Civilization.

In 1942, he took leave of absence from Harvard in order to join the FBI. At the close of the war, he stayed in the FBI, rather than return to Harvard.

He worked as an FBI Agent in all parts of the nation, handling all kinds of assignments. But for three and a half years, he worked exclusively on communist investigations in the industrial midwest. For two years following that, he was on FBI headquarters staff in Washington, as an Administrative Assistant to J. Edgar Hoover.

After nine and a half years in the FBI, Smoot resigned to help start the Facts Forum movement in Dallas. As the radio and television commentator for Facts Forum, Smoot, for almost four years spoke to a national audience giving both sides of great controversial issues.

In July, 1955, he resigned and started his own independent program, in order to give only one side — the side that uses fundamental American principles as a yardstick for measuring all important issues.

If you believe that Dan Smoot is providing effective tools for those who want to think and talk and write on the side of freedom, you can help immensely by subscribing, and encouraging others to subscribe, to *The Dan Smoot Report.*

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